91-1911

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

No.

SUPREME COURT OF THE UNITED STATES

The October, 1991 Term

MOBILE MEDEX, INC.,
Petitioner,

v.

NEW JERSEY DEPARTMENT OF LABOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

DOUGLAS F. ORTELERE, ESQ.
Counsel of Record
911 Soldier Hill Road
Oradell, New Jersey 07649
(201) 265-7218

QUESTIONS PRESENTED FOR REVIEW

1. Did the New Jersey Courts by their failure to follow N.J. Court Rule 2:11-3(e)(1)(D) violate the due process and the equal protection clause of the 14th Amendment of the United States Constitution?

   A. Did the Appellate Division unduly defer to the legislative intent expressed in N.J. Stat. Ann 43:21-2(West 1991) so as to deny the aforementioned rights under United States Constitution?

   B. Upon the failure to apply N.J. Court Rule 2:11-3(e)(1)(D) in this instance, have the New Jersey Courts improperly created a class without any rational basis, as otherwise required under the United States Constitution?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW.....i

TABLE OF AUTHORITIES.....iii

REFERENCE TO OPINIONS BELOW IN THIS CASE.....v

STATEMENT OF JURISDICTION.....vi

THE APPLICABLE CONSTITUTIONAL PROVISION AND OTHER AUTHORITIES.....vii

STATEMENT OF THE CASE.....1

CONCLUSION.....16

APPENDIX

TABLE OF AUTHORITIES

PAGE

CASES CITED

Armstrong v. Manzo, 380 U.S. 545 (1965).....11

Ex Parte Woods, 143 U.S. 202 (1892).....11

Forsyth v. Hammond, 166 U.S. 506 (1897).....11

Lau Ow Bew v. United States, 144 U.S. 47 (1892).....11

Parratt v. Taylor, 451 U.S. 537 (1981).....11

Yick Wo v. Hopkins, 118 U.S. 356 (1885).....15

Campbell v. Depart. of Civil Service, 39 N.J. 556, 562 (1963)...9,10

Carpet Remnant Warehouse v. N.J. Department of Labor, 125 N.J. 567, 577 (1991).....6,7,12

Henry v. Rahway State Prison, 81 N.J. 571, 579-580 (1980).....9

CONSTITUTION AND STATUTES CITED

U.S. Const. amend. XIV, Sec 1.....vii

28 U.S.C.A. 1257 (West 1991).....vi

TABLE OF AUTHORITIES
(continued)

PAGE

N.J. Stat. Ann. 43:21-7 (West 1991).....1
N.J. Stat. Ann. 43:21-19 (i) (6) (A), (B), (C).(West 1991).....3
N.J. Stat. Ann. 52:14B-9 (West 1991)....9

N.J. Stat. Ann. 52:14B-9(c) (West 1991).....3

N.J. Stat. Ann. 52:14B-10(c) (West 1991).....3,4

COURT RULE CITED

N.J. Court Rule 2:11-3(e)(1)(D)...8,10,13

REFERENCE TO OPINIONS BELOW IN THIS CASE

Mobile Medex, Inc. v. New Jersey Department of Labor, Initial Decision, State of New Jersey Office of Administrative Law, OAL Docket No. LID 5056-88, Decided January 11, 1990.

Mobile Medex, Inc. v. New Jersey Department of Labor, Final Administrative Action of the Commissioner, State of New Jersey Department of Labor, Docket No. DOL 88-029, Issued April 16, 1990.

Mobile Medex, Inc. v. New Jersey Department of Labor, Per Curiam Opinion, Appellate Division of the Superior Court of New Jersey, Docket No. A-4775-89T2, Opinion Filed March 27, 1991.

Mobile Medex, Inc. v. New Jersey Department of Labor, Denial of the Petition for Certification, Supreme Court of New Jersey, Docket No.: 33,552, Filed September 6, 1991.

Mobile Medex, Inc. v. New Jersey Department of Labor, Order of Denial of Motion for Reconsideration of the Denial of the Petitition for Certification, Supreme Court of New Jersey, Docket No.: 33,552, Filed January 16, 1992.

STATEMENT OF JURISDICTION

The Supreme Court of New Jersey denied the Petition for Certification on September 6, 1991. Thereafter, a Motion for Leave to file a Motion for Reconsideration of the Earlier Denial of the First Petition for Certification was granted on January 14, 1992. The Motion for Reconsideration of the Denial of the Petition for Certification was denied on January 14, 1992. This Court has jurisdiction with regard to this matter pursuant to 28 U.S.C.A. 1257 (West 1991).

THE APPLICABLE CONSTITUTIONAL PROVISION AND OTHER AUTHORITIES

U.S. Const. amend. XIV, Sec.1.:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N.J. Court Rule 2:11-3 (e)(1) (1969):

> (e) Affirmance without Opinion:
> (1) Civil Appeals. When in a civil appeal the Appellate Division determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision:

(A) that a judgement of a trial court is based on findings of fact which are adequately supported by evidence;
(B) that the evidence in sup-support of a jury verdict is not in sufficient;
(C) that the determination of trial court on a motion for a new trial does not constitute a manifest denial of justice;
(D) that the decision of an administrative agency is supported by sufficient credible evidence on the record as a whole;
(E) that all issues of law raised are clearly without merit and the court determines that an opinion would have no precedential value;

then and in any such case the judgement or order under appeal may be affirmed without opinion and by an order quoting the applicable paragraph of this rule.

STATEMENT OF THE CASE

On or about April 28, 1988, the New Jersey Department of Labor did issue a Notice of Determination to Mobile Medex, Inc. whereby an assessment was imposed with regard to alleged outstanding contributions to the Unemployment Compensation Fund, pursuant to N.J. Stat. Ann. 43:21-7 (West 1991). On or about May 5, 1988, the Petitioner, Mobile Medex, Inc., did request a hearing before the New Jersey Office of Administrative Law, pursuant to N.J. Stat. Ann. 52:14B-9 (West 1991). Mobile Medex, Inc. sought a determination that same should not be held responsible for the remittance of

contributions to the Unemployment Compensation Fund, on behalf of those people who perform independent medical examinations upon those who seek insurance., pursuant to N.J. Stat. Ann. 43:21-19(i)(6)(A),(B), and (C)(West 1991). On September 15, 1989, the Honorable Edith Klinger, A.L.J. conducted a comprehensive and thorough hearing wherein, the Judge heard testimony from both representatives of the New Jersey Department of Labor and Elinor Slowinski, R.N., Theresa M. Tietjen, R.N. and Ann N. Frisch, R.N. on behalf of the Petitioner, Mobile Medex, Inc. On or about January 17, 1990, after having compiled a complete record in this matter, the Office of Administrative Law did render a Decision wherein the Judge ruled that the paramedic examiners were independent contractors and not employees thus deciding that Mobile Medex Inc. would not be responsible for unemployment taxes.

Quizzically, pursuant to the Administrative Procedure Act, N.J. Stat. Ann. 52:14B-9(c) (West 1991), the same Department which first asserted the instant claim, is allowed to review the determinations of the independent Office of Administrative Law. The same office,the office of the Commissioner of Labor, which presented the case in support of the assessment before the Office of Administrative Law, therefore elected to review the reasoned decision by the Honorable Edith Klinger, A.L.J. as permitted by N.J. Stat. Ann. 52:14B-10(c)(West 1991).

After the entry of a reasoned decision which was contrary to the position asserted by the New Jersey Department of Labor as a party to the contested case, the losing party, the State of New Jersey, sought the further review of this dispute in a forum, which would be more to the liking to the New

Jersey Department of Labor, mainly the Commissioner of Labor. Pursuant to N.J. Stat. Ann. 52:14B-10(c) (West 1991), the Commissioner has the right to reject or accept the Honorable Edith Klinger, A.L.J.'s decision. On or about May 14, 1990, the Petitioner, Mobile Medex, Inc. filed a Notice of Appeal with the Appellate Division of the Superior Court of New Jersey. On March 27, 1991, the Appellate Division did resolve the appeal in the favor of the Commissioner of the New Jersey Department of Labor. The brief opinion is set out below:

PER CURIAM.

> The final administrative action of the Commissioner of the Department of Labor of the State of New Jersey (Commissioner) declaring petitioner Mobile Medex, Inc. (Mobile Medex) liable for unemployment and temporary disability contributions pursuant to the New Jersey Unemployment Compensation Act for remunerations paid to its paramedics is affirmed substantially for the reasons expressed by Commissioner Bramucci in his written decision of April 16, 1990. We are satisfied from our

> study of the record and the arguments presented that the Commissioner's decision holding paramedics not to be independent contractors pursuant to N.J.S.A. 43:21-19(i)(6)(A), (B) and (C) is neither arbitrary, capricious nor unreasonable, does not lack full support in the record, and does not violate legislative policies expressed or fairly implied in the statutory scheme administered by the Department of Labor. See Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980); Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963). See also R. 2:11-3(e)(1)(D) and (E). Affirmed.

The Appellate Division of the Superior Court of New Jersey erred in using the wrong standard of review. This was a fundamental error that lead to a denial of due process and equal protection under the United States Constitution. The Court also stated that there was full support in the record for the ruling by the Commissioner of the New Jersey Department of Labor. Yet, this is entirely untrue, wherein the sitting judge of the Office of Administrative Law

had ruled in favor of the Petitioner, Mobile Medex, Inc., thus making this case a contested case requiring greater scrutiny, not less. In light of these additional fundamental and egregious errors, the Petitioner, Mobile Medex, Inc., sought to have the Supreme Court of New Jersey consider this matter. On May 3, 1991, Mobile Medex, Inc. filed a Petition for Certification with the Clerk of the New Jersey Supreme Court. The Petitioner sought to have the Supreme Court remand the matter to the Appellate Division of the Superior Court with an instruction to re-examine the matter in light of the correct standard of review. The Supreme Court of New Jersey denied this application on September 6, 1991. On August 6, 1991, the Supreme Court of New Jersey in Carpet Remnant Warehouse v. Dept. of Labor, 125 N.J. 567, 577 (1991) ruled upon the same issue, yet did not grant any part of the request made on

behalf of Mobile Medex, Inc. The New Jersey Supreme Court reaffirmed the existence and use of the sufficient credible evidence in the record standard by the Appellate Division of the Superior Court of New Jersey in such cases. This appears to be identical to the standard of review set out for use by the Appellate Division in N.J. Court Rule 2:3-11(e)(1)(D). In light of the conflict between the treatment of this instant application and the resolution of the matter in Carpet Remnant Warehouse v. Department of Labor, 125 N.J. 567 (1991), the Petitioner filed a motion for reconsideration of the earlier denial of the Petition for Certification. This request was again denied by the Supreme Court of New Jersey on January 14, 1992.

The issue of the appropriateness of the standard of review was raised in the Brief before the Appellate Division of the Superior Court. This and the lack of

the equal application of the law in this matter was raised before the Supreme Court of New Jersey in the Petition for Certification. Furthermore, the Petitioner raised the question of the application of the equal protection clause of the 14th Amendment to the United States Constitution in the request to that Court for reconsideration of their prior refusal to hear this matter on the merits.

N.J. Court Rule 2:11-3(e)(1)(D) dictates that the Appellate Division must review these cases by looking through the record for at least sufficient credible evidence to allow for the affirmance of the determination by the Commissioner of Labor. By instead, legally electing to resolve the matter by stating that the determination was not found to be arbitrary or unreasonable the Appellate Division denied to Mobile Medex Inc. the fair application of N.J. Court Rule

2:11-3(e)(1)(D). Without question, the doctrine of due process and equal protection found in our United States Constitution insist upon the equal application of the New Jersey Court Rules in this matter. The Appellate Division offers Henry v. Rahway State Prison, 81 N.J. 571, 579-580 (1980), and Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963) as support for the use and adoption of the illegal and more limited standard of review. However, a careful reading of each decision does reveal that there is misplaced reliance upon same because the Commission was created by statute and was given the authority by statute to modify or amend the penalty of a civil service employee. Therefore, unless a decision was arbitrary or capricious, there was no provision of law for the courts to substitute their judgment for the Commission. Henry v. Rahway State Prison, 81 N.J. 571, 575

(1980), Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963). Significantly, N.J. Court Rule 2:11-3 (e)(1)(D) which directs that in each and all instances, the standard of sufficient credible evidence must be utilized by the Appellate Division of the Superior Court of New Jersey. became effective on or about January 2, 1986.

This court must cure the plain and injurious error on the part of the New Jersey Supreme Court to grant the Petition for Certification. The denial of the petition below improperly creates a conflict between the high court and the intermediate Appellate Court of the State of New Jersey.

The United States Constitution, pursuant to the due process clause of the 14th Amendment, dictates that every party that comes before the judicial process established by the State of New Jersey must be accorded fairness.

This Court had declared that due process imposed upon all of the States includes the provision of a procedure of a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L.Ed.2d 62 (1965), Parratt v. Taylor, 451 U.S. 537, 101 S.Ct. 1908, 1915, 68 L.Ed.2d (1981).

Without question, a meaningful procedure must not only allow but insist upon the uniformity of the decision making process by any judicial system. Ex Parte Woods, 143 U.S. 202, 12 S.Ct. 417, 36 L.Ed. 125 (1892), Lau Ow Bew v. United States, 144 U.S. 47, 12 S.Ct. 517, 36 L.Ed. 340 (1892), Forsyth v. Hammond, 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095 (1897). In as much as the Supreme Court of New Jersey acted in an improvident and improper manner upon the denial of the petition for certification in this case on September 6, 1991, all that the New Jersey Supreme Court need

do, at the time, was to remand this case to the Appellate Division of the Superior Court of New Jersey with the instruction that the case be reviewed again under the correct standard of review. By the denial of the petition below, the New Jersey Supreme Court allowed there to come into being a conflict between their ruling in this matter, N.J. Court Rule 2:11-3(e)(1)(D), and the opinion in Carpet Remnant Warehouse v. Department of Labor, 125 N.J. 567 (1991). In the other matter, the New Jersey Supreme Court reaffirmed that on appeal, the Appellate Division may review these matters by their search for sufficient credible evidence in the record. Carpet Remnant Warehouse v. Department of Labor, 125 N.J. 567, 577 (1991).

This opinion was released by the New Jersey Supreme Court on August 6, 1991 and was pending on the docket, and under consideration by the New Jersey Supreme

Court at the same time as the instant matter. Thus, this lack of uniformity and the denial of the Constitutional Rights of due process and equal protection of Petitioner, Mobile Medex, Inc. can only be rectified by the granting of this Petition for a Writ of Certiorari.

In the review of this matter, by the court of first impression, the Appellate Division was obligated to dispose of this case through the application of the New Jersey Court Rules. In light of their usual purpose, the Rules are intended to serve as a guide for the Court in the disposition of every appeal which is pursued by every party. N.J. Court Rule 2:11-3(e)(1) provides as follows:

> (e) Affirmance without Opinion:
> (1) Civil Appeals. When in a civil appeal the Appellate Division determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision:
> (A) that a judgement of a trial court is based on findings of

fact which are adequately supported by evidence;

(B) that the evidence in support of a jury verdict is not insufficient;

(C) that the determination of a trial court on a motion for a new trial does not constitute a manifest denial of justice;

(D) that the decision of an administrative agency is supported by sufficient credible evidence on the record as a whole;

(E) that all issues of law raised are clearly without merit and the court determines that an opinion would have no precedential value; then and in any such case the judgement or order under appeal may be affirmed without opinion and by an order quoting the applicable paragraph of this rule.

In their disposition of this appeal, the Appellate Division of the Superior Court of New Jersey failed to evaluate the administrative record below in light of this due process standard which was properly developed as a guide for the Appellate Division of the Superior Court in each and every case. The complaint made in this Petition to

this Court arises from the failure of the New Jersey Courts to apply the stated rule to this party.

This Court has already correctly described such conduct as contrary to the Equal Protection clause of the United States Constitution. This Court in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 30 L.Ed. 220 (1885), has already spoken with regard to the ills and harm that can be done upon the unequal execution and application of the laws.

This Court declared as follows:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circum stances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. Yick Wo v. Hopkins, 118 U.S. 356,373-374, 6 S.Ct. 1064, 30 L.Ed. 320 (1885).

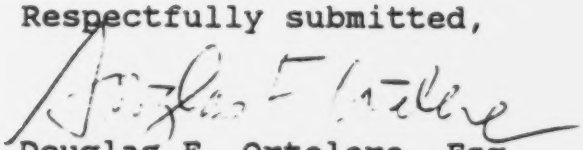
The unequal application of any law, particularly a rule of Court which is

intended from the outset to apply to every case and party, is, as here, a violation of the equal protection of the laws as is provided by the 14th Amendment to the United States Constitution.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court grant the instant Petition for a Writ of Certiorari.

Respectfully submitted,



Douglas F. Ortelere, Esq.
Counsel for Petitioner,
Mobile Medex, Inc.

Dated: April 13, 1992

INDEX TO APPENDIX

PAGE

Mobile Medex, Inc. v. New Jersey Department of Labor, Initial Decision, State of New Jersey Office of Administrative Law, OAL Docket No. LID 5056-88, Decided January 11, 1990.....1

Mobile Medex, Inc. v. New Jersey Department of Labor, Final Administrative Action of the Commissioner, State of New Jersey Department of Labor, Docket No. DOL 88-029, Issued April 16, 1990.....41

Mobile Medex, Inc. v. New Jersey Department of Labor, Per Curiam Opinion, Appellate Division of the Superior Court of New Jersey, Docket No. A-4775-89T2, Opinion Filed March 27, 1991.....62

Mobile Medex, Inc. v. New Jersey Department of Labor, Denial of the Petition for Certification, Supreme Court of New Jersey, Docket No.: 33,552, Filed September 6, 1991.....65

Mobile Medex, Inc. v. New Jersey Department of Labor, Order of Denial of Motion for Reconsideration of the Denial of the Petitition for Certification, Supreme Court of New Jersey, Docket No.: 33,552, Filed January 16, 1992.....67

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. LID 5056-88
AGENCY DKT NO. DOL 88-029

MOBILE MEDEX, INC.,

Petitioner,

v.

NEW JERSEY DEPARTMENT
OF LABOR,

Respondent.

Timothy N. Tuttle, Esq., for petitioner

Bessie A. Sacco, Deputy Attorney General, for respondent (Peter N. Perretti, Jr., Attorney General of New Jersey, attorney)

Record Closed: November 30,1989
Decided January 11, 1990

BEFORE EDITH KLINGER, ALJ:

Mobile Medex, Inc. (petitioner) appeals the determination of the Department of Labor (Department) that it is subject to liability for contributions under the Unemployment Compensation Law of New Jersey. Petitioner argues that the alleged employees, paramedical examiners performing examinations for insurance companies or agents, are independent contractors under N.J.S.A. 43:21-19(i)(6)(A), (B) and (C) and appeals the Department's assessment of contributions for the years 1981 through 1987. Petitioner's appeal includes the years 1981 through 1984 with the consent of the Department. The Department has agreed to withdraw its claim against Mobile Medex for assessments prior to 1981.

Mobile Medex disagreed with a Notice of Determination dated April 28, 1988 from John J. Maroney, Chief Auditor of

the Office of the Comptroller, Department of Labor, issued as a result of an audit/examination completed by Kevin J. Crossan. It requested a hearing on May 5, 1988, and on July 11, 1988, the matter was transmitted to the Office of Administrative Law for adjudication as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A.52:14F-1 et seq. The hearing was held on September 15, 1989, and the record was held open until November 39, 1989, when the last submission was received from the parties.

The issues to be resolved are :

1. Whether petitioner is exempt from liability for contributions under N.J.S.A. 43:21-19(i)(6)(A), (B) and (C), (ABC Test), for remuneration paid to paramedical examiners, and
2. If not, in what amount is petitioner liable for contribution?

UNDISPUTED FACTS

The material facts in this matter are not in dispute and I FIND the FACTS set forth in the following summary to be uncontested.

Ray Cohen (Cohen) is the manager of Mobile Medex, Inc. Mobile Medex provides services to both insurance companies and paramedics.

Before an insurance agent writes a life or health insurance policy, he often needs to to obtain a physical examination of the prospective insured. An examination may also be needed when there is a change in a policy or a follow-up on a disability claim. The insurance company or agent calls petitioner and requests to have a paramedic conduct the examination. The insurance company or agent specifies the type of examination needed, and

petitioner provides a paramedic to perform it.

Mobile Medex performs this service for many insurance companies but relies upon four major insurance companies for the bulk of its business.

The paramedics who perform the actual physical examinations are health care professionals. Processing the results of these examinations entails a considerable amount of paperwork, which paramedics typically would rather not do themselves. Many prefer to enter into a relationship with an agency like Mobile Medex so they are able to limit their nonprofessional tasks. Mobile Medex solicits the examinations, bills the insurance companies, and does all of the bookkeeping, photocopying and other administrative work for the paramedics.

When a paramedic completes a referred examination, he invoices Mobile Medex,

which remunerates him within five to ten business days. The insurance companies pay petitioner at a later time. Petitioner's profit comes from the fees which insurance companies pay for its services.

Petitioner advertises in newspapers for paramedics. It interviews and determines the qualifications of those who respond.

Paramedics must have some medical training. Some are registered nurses, licensed practical nurses or medical assistants. Some are former military medical technicians. Mobile Medex does not train them. Typically, paramedics can and do accept other work in homes, hospitals or laboratories.

The fixed fee which Mobile Medex pays to a paramedic is negotiated with the individual paramedic. Some paramedics are paid more than others, depending upon

their equipment, experience and the type of examination needed. A paramedic is paid by the case and not by the hour or with a fixed salary. Mobile Medex always has a written contract with each paramedic on its list.

Mobile Medex maintains a file on each of the paramedics. When it receives a telephone call from an insurance company or agent, petitioner calls a paramedic on its list and asks if he is willing to accept the assignment. The paramedic is free to accept an assignment or refuse it; if one paramedic refuses, petitioner calls another.

A paramedic may limit his work to a particular geographic area, to a particular time of day, or to a particular type of examination. For example, a paramedic may choose not to work during the evening or in certain

geographical areas. Some paramedics may not want to draw blood. Other paramedics will take whatever examination is available. Cohen is usually aware of any restrictions a paramedic places on his services and will offer assignments bearing these restrictions in mind.

The paramedic sets up an appointment with the person to be examined at a mutually convenient location. Mobile Medex does not set up these appointments. The paramedics have no time frame set by petitioner in which to complete an assignment, but they are aware of the importance of the examinations to the insurors and insureds and know that their report must be submitted within a reasonable time.

The paramedics must arrange for their own transportation to the location where they are to perform the examination. They are not reimbursed for gas, tolls,

mileage, telephone bills or other expenses. No examinations are conducted upon the premises of Mobile Medex. Paramedics typically carry their own medical malpractice insurance which they pay for themselves. Petitioner carries insurance for its business but no medical malpractice insurance for services rendered by its associated professionals. It does not require the professionals to file a certificate of insurance with it. The contract which Mobile Medex has with each paramedic obligates the paramedic to indemnify it for any claims arising through the professional activities of the paramedic.

A paramedic's equipment usually includes a tape measure, a blood pressure cuff, a stethoscope, a scale, and urine dipsticks. Some own an electrocardiogram (EKG) machine, or a centrifuge. All paramedics own some equipment, and some

paramedics own a great deal of equipment. They purchase and maintain their own equipment and each paramedic decides for himself what equipment he will purchase. Mobile Medex provides no medical supplies and does not reimburse for them, though a paramedic who owns an EKG machine can usually negotiate a higher fee.

After the examination, the paramedic completes an examination form. They all have their own billing or invoice forms. A typical invoice shows the client's name,the insurance company, the date of the examination, the service performed, and the fee. The invoice and the examination form are transmitted to Mobile Medex. Petitioner reviews the contents of the examination forms only for completeness. No professional review is made.

After making photocopies of the completed examination forms, Mobile Medex

sends them to the insurance companies. It then bills the insurance companies for the services provided.

A paramedic may call an insurance company or agent directly to solicit business. If an insurance provider prefers a particular paramedic, it may call that paramedic directly. Some paramedics are specifically requested from Mobile Medex by insurance companies. Some insurance companies supply their own paramedics.

Mobile Medex does not have any written contracts with insurance companies. There are competitors providing the same services as petitioner. If Moile Medex did not exist, paramedics would continue doing insurance examinations through its competitors or independently.

Neither Cohen nor anyone else in the industry treats the paramedics as employees or tells then how to perform

their work. Petitioner does not keep a record of the paramedic's hours. Mobile Medex issues IRS 1099 forms to all paramedics and all paramedics file a Schedule C on their Federal Income Tax Returns.

Elinor Solowinski,R.N., is a paramedic. She has had a business relationship with petitioner for several years. Solowinski worked as a registered nurse in New Jersey before she worked as a paramedic. Prior to 1989, Solowinski accepted insurance examinations assignments from Physical Measurements, Body Metrics and Beth Durland Associates, as well as Mobile Medex. All of these concerns are in the same business as petitioner. In addition, Solowinski solicited some examinations herself.

She now has other paramedics doing work for her under her trade name Elinor Solowinski Associates. Solowinski

assigns work to these paramedics out of ther own home, maintains records of all their appointments and bills the insurance companies for their services. She obtained a Federal Employee Identification Number. She no longer has a contract with Mobile Medex and is presently a competitor.

When Solowinski performed examinations for Mobile Medex, she called petitioner, but more often, it called her to arrange assignments. She worked through Mobile Medex and other agencies because, at the time, she did not want to be bothered by telephone calls from insurance agents. She billed Mobile Medex using her own billing forms and was paid within a week to ten days after she performed the examination. Solowinski bore the risk of a loss of her fee, if an appointment were made and the client did not show up.

Solowinski always set the time and place for the examination, which was typically conducted in the home or office of the client or at the office of the insurance agent. When meeting a client, Solowinski identified herself by name and stated that she was representing a specific insurance company. The client normally was not aware of her relationship to Mobile Medex.

An examination takes 15 to 20 minutes and typically consists of taking the examinee's height, weight, blood pressure, urine specimen and medical history. An insurance agent is sometimes present at the examination. Solowinski once had to borrow an EKG machine for an assignment, but otherwise she owns her own equipment.

Solowinski performed approximately 15 examinations per week for petitioner After the examination, she completed an

examination form provided by the insurance company. She submitted the form to petitioner, who paid her fee and billed the insurance company for services. Approximately one-quarter to one half of her income was derived from Mobile Medex. She provided her own malpractice insurance.

Solowinski now has her own business, doing exactly what she did for Mobile Medex. If petitioner had gone out of business while she was associated with it, Solowinski could have continued to operate, through another agency or by herself. She has always had her own business card and business phone and now has her own trade name.

Theresa M. Tietjen, R. N., is a paramedic examiner. She has a written contract with petitioner and considers herself to be an independent contractor. Besides working with Mobile Medex, she

also works with Portomedics, from which she derives one-half of her cases. Tietjen maintains her own appointment schedule and handles approximately 20 to 30 cases per week. She has her own business card and has converted space in her home to serve as an office. She has a special telephone line for business purposes and employs her own telephone answering service.

Tietjen's equipment includes an EKG machine, a TVC machine, a centrifuge, scales, a blood pressure cuff, and urine dipsticks. She states that the total cost to her of these items was significant and she received no reimbursement from Mobile Medex.

Her business consists of conducting insurance "physicals." Mobile Medex takes care of her billing and administrative work and screens her calls. Cohen may call Tietjen for available work, or

Tietjen may call him. Cohen knows the area to which Tietjen prefers to limit her work but she does occasionally negotiate with him to perform physicals outside of her usual area. She sets her own hours and determines the location of her work. Her fee was negotiated with petitioner at the outset of their association.

After she accepts an assignment, Tietjen telephones the client to make an appointment to conduct the insurance physical. When she appears for the examination, she identifies herself by name and states that she represents a particular insurance company. She can change or cancel her own appointments as her schedule requires. She can refuse to accept cases from petitioner and has done so occasionally.

Tietjen carries her own medical malpractice insurance. Mobile Medex does

not require insurance and is not named as an insured. She receives no reimbursement for her expenses.

Tietjen keeps a supply of blank examination forms, from insurance companies, in her possession. She also keeps blank examination forms without company names and receives some standard forms from petitioner

Tietjen does not solicit insurance business for herself at this time, but if petitioner ceased to exist, Tietjen could continue to work at her profession

Tietjen files a Federal Income Tax Schedule C and receives a Form 1099 from Mobile Medex. Her income from petitioner represents about half of her total income.

Ann N. Frisch, R.N., has been a paramedical examiner for four and one-half years. In addition to working with petitioner, she performs insurance

examinations for Physical Measurements and PortoMedics. She considers herself an independent contractor who manages her own business. She has her own business telephone and maintains an office in her home. She carries her own medical malpractice and disability insurance.

Frisch has a written contract with petitioner. She sets her own hours of work and prefers to conduct examinations in an area close to her home. She pays a self employment tax and has her own Federal Employer Tax Identification Number.

These three paramedics are typical of those associated with Mobile Medex.

THE APPLICABLE LAW

It is agreed by the parties that the law governing exemption from liability for contributions under the Unemployment

Compensation Law of New Jersey is N.J.S.A. 43:21-19(i)(6)(A), (B) and (C), set forth below:

(i)(6) Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (R.S. 43:21-1 Et seq.) unless and until it is shown to the satisfaction of the division that:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established

trade, occupation, profession or business.

POSITIONS OF THE PARTIES

Petitioner argues that the paramedics perform services satisfying all the criteria above, (A), (B) and (C), and therefore are independent contractors for purposes of the Unemployment Compensation Law. Respondent argues that the paramedics' employment does not satisfy any of the three criteria.

DISCUSSION OF LAW AND CONCLUSION

All three conditions of the so-called "ABC" test must be satisfied or the resulting relationship must be deemed one of statutorily covered employment. Electrolux Corp. v. Board of Review, 129 N.J.L. 157, 159 (E. & A. 1942); Gilchrist v. Division of Employment Security, 48 N.J. Super. 147, 157 (App.

Div. 1957). Application of the "ABC" test must be consistent with the intent of the Unemployment Compensation Act (UCA), which is remedial social legislation to be construed liberally in order to accomplish its end. Consumers' Research Inc. v. Evans, 128 N.J.L. 95, 97 (Sup. Ct. 1942), aff'd, 132 N.J.L. 431 (E. & A. 1945). As a result of the broad construction required, the relationship of employer and employee may be found to exist in circumstances which would not lead to that determination under common law. Gilchrist at 153.

Once it has been established that remuneration has been paid to individuals by a purported employer, a presumption of employment exists, unless and until the alleged employer can demonstrate that the relationship satisfies each of the elements of the "ABC" test. Electrolux at 158. It is the burden of the petitioner

to prove that the paramedics associated with Mobile Medex are not its employees within the meaning of the statute.

N.J.S.A. 43: 21 - 19(i)(6)(A)

The first prong of the ABC test requires that the individuals in question have been and will continue to be free from control or direction over the performance of their services, both under an existing contract and in fact. In making this determination, based upon the facts and circumstances of each case, particular attention must be paid to the substance rather than the form of the relationship Schomp v. Fuller Brush Co., 124 N.J.L. 487, 490 (Sup. Ct. 1940), aff'd, 126 N.J.L. 368 (E. & A. 1941); Electrolux at 159. It is not determinative that the parties have designated their relationship as that of independent contractor to principal. Provident v. Division of Employment

Security, 32 N.J. 585, 591 (1960). In addition, the fact that an alleged employer does not exercise complete control or direction over every detail of the service in question does not mean that the individuals are free from control and direction within the meaning of the statute. Superior Life v. Bd. of Review, 127 N.J.L. 537, 540 (Sup. Ct. 1942).

Mobile Medex claims that the paramedics are free from its control or direction over the performance of their paramedical services. It may offer an assignment to a paramedic, but the paramedic is free to refuse the assignment. If an assignment is accepted, the paramedic sets the time and place for the examination. Petitioner does not provide any training, and does not tell the paramedic how to conduct the examination. The information is obtained

pursuant to the direction of the insurance company or agent and as an apparent agent of the insurance company or agent. The paramedic chooses his own equipment. Petitioner has no input into the content of the examiner's report.

Petitioner has a contract with all paramedics to whom it refers clients. The paramedics may work for other agencies or solicit business on their own. The paramedic assumes the risk of not receiving payment if an examinee fails to keep his appointment.

I FIND that none of these factors establish control or direction of the paramedics by Mobile Medex.

Respondent argues that the paramedics in question are under the control or direction of the petitioner because: (1) the petitioner conducts interviews and may reject the paramedics' applications; (2) the petitioner requires the

paramedics to conduct the examinations within a certain time period and the paramedics may not reassign their examinations; (3) the petitioner provides the paramedics with insurance forms and reviews the paramedical reports and (4) the petitioner sets the rate of payment.

(1) Interviews

Mobile Medex advertises in the newspapers for paramedics and interviews those who respond in order to establish their qualifications. The paramedics must possess some medical training, such as that of a registered nurse or medical assistant, because Mobile Medex does not provide training. If Mobile Medex believed that a prospective paramedic did not possess sufficient qualifications, it would not enter into a contract for the

use of his services. I FIND that this cannot be considered an exercise of control: one would not engage a plumber to repair a pipe unless one were satisfied that he was competent to do the job. This is not a different situation. Whenever one engages the services of a professionally trained person, it is common sense and not control that dictates an investigation of his qualifications.

(2) Examinations

When it receives a telephone call from an insurance company or agent requesting an examination, Mobile Medex calls a paramedic and asks if he will accept the assignment.

If the paramedic accepts the assignment, he sets up an appointment with the person to be examined. The paramedics complete their assignments at

their own convenience and that of the particular examinee's. Mobile Medex requires the completion of examinations within a reasonable period of time so that insurers and insureds can complete their transactions. A completed examination results in a payment to petitioner and to the paramedic. If the paramedic never completes the assignment, no one's purpose is served. I FIND that the requirement by Mobile Medex that an assignment be carried out within a reasonable period of time is simply a means of completing a business transaction and not an exercise of control over the paramedic.

I FIND that the prohibition by Mobile Medex against a paramedic reassigning a case is not an exercise of control such as an employer might exert over an employee. I FIND that the prohibition is consistent with the petitioner's

requirement that the paramedics have the appropriate qualifications; allowing a paramedic to freely reassign a case could easily result in a failure to maintain professional standards. I also FIND that the prohibition is a reasonable means to prevent the paramedics from establishing their own businesses based upon clients of Mobile Medex. I further FIND that the prohibition prevents the dilution of the paramedic's obligation under its contract with Mobile Medex, to indemnify it for any claims arising through the professional activities of the paramedic.

(3) Forms and Reports

After the examination, the paramedics complete examination reports provided by the insurance company or report forms which they generate themselves. The completed forms are sent to petitioner.

All paramedics have their own billing or invoice forms. The paramedic prepares the invoice showing the client's name, the insurance company for which the examination was conducted, the date of the examination, the service performed, and the paramedic's fee. Petitioner does not review the content of the examination form except for completeness.

If an examination form is complete, Mobile Medex photocopies it and sends it to the insurance company or agent who requested the examination. Petitioner then bills the insurance company and pays the paramedic his previously negotiated fee based upon the paramedic's invoice. Mobile Medex's role is clearly administrative and not supervisory. I FIND that Mobile Medex exerts no control over the paramedics by virtue of the forms used by the paramedics.

(4) Rate of Payment

Petitioner's profit is derived from the fee paid to it by the insurance company for the service. Petitioner then pays a fixed fee to the paramedic, which was previously negotiated based upon the paramedic's experience, equipment and the type of examination. This fee does not depend upon the rate of payment by the insurance company. The paramedic is paid by the case and not by the hour or by means of a fixed salary. If the examinee does not show up for his appointment, the paramedic does not get paid at all. I FIND that the rate which petitioner pays to the paramedics is not an indicia of control or direction. It is what it purports to be, a professional fee for services rendered.

Conclusion

The facts demonstrate that the

paramedics choose how they want to work, when they want to work and what they will be paid. They carry their own insurance and pay their own expenses. They use petitioner as one of many sources of referrals and as a clearinghouse for paperwork. I CONCLUDE that Mobile Medex does not control or direct the activities of the paramedics within the meaning of N.J.S.A. 43:21-19(i)(6)(A).

N.J.S.A. 43:21-19(i)(6)(B)

Petitioner must show that the services performed by the purported independent contractors are either outside the usual course of the business for which such services are performed or that such services are performed outside all of the places of business of the enterprise for which such services are performed.

Mobile Medex contends that the examinations are not performed at its place of business but rather at the homes and offices of the clients, insurance agents or the paramedic examiners. The Department argues that the locations where the examinations take place are the places of business of the enterprise for purposes of the statute and for this reason, Mobile Medex cannot meet the second part of the ABC Test.

It is clear from the testimony and I FIND that Mobile Medex is not in the business of performing insurance examinations; it is in the business of obtaining paramedical professionals to conduct insurance examinations for the benefit of insurance companies and their insureds. The professionals receive a predetermined fee for their services and the insurance companies receive a medical report on a potential insured. Mobile

Medex receives income by providing insurance companies and agents with a reliable source of paramedical examiners so that the insurance producers do not have to maintain their own staff or struggle to locate independent examiners. The paramedics, on the other hand, are relieved of the time consuming chores of soliciting business and doing the paperwork, billing and collection which follow.

The paramedics differ from carpet layers or life insurance salesmen in that, when they enter the home or office of a client to perform an examination, they are not on the business of Mobile Medex but rather on the business of the insurance company; Mobile Medex produces no carpets to be installed or insurance policies to be sold. It merely serves as a conduit for the transmission of examination results from the paramedic to

the insurance company. I therefore FIND that the sites upon which the paramedics perform their services cannot be considered extensions of the place of business of Mobile Medex.

Conclusion

Based upon the above, I CONCLUDE that the service performed by the paramedics is outside of the usual course of business of Mobile Medex and that service is performed outside of all of the places of business of Mobile Medex. I therefore CONCLUDE that the services provided by the paramedics satisfy the provisions of N.J.S.A. 43:21-19(i)(6)(B).

N.J.S.A. 43:21-19(i)(6)(C)

In order to prove that the paramedics are independent contractors, Mobile Medex

must show that they are customarily engaged in an independently established trade, occupation, profession or business.

All of the paramedics are health care professionals: registered nurses, licensed practical nurses, medical assistants or former military medical technicians. None of their training was provided by Mobile Medex. Most of the paramedics also perform examinations for competitors of Mobile Medex or have their own independent business making direct contact with insurance companies and agents. All have their own business addresses, telephones and invoice forms.

That each of them is customarily engaged in an independently established business is demonstrated by the fact that all could continue to provide insurance companies with physical examination reports if Mobile Medex were to leave the

business. Many are in direct competition with Mobile Medex while it is still in business and they are still accepting work from it.

The insurance examiners have their own equipment, use forms provided by the insurance companies or make up their own, provide their own transportation, pay their own expenses, bear the risk of loss of their fee if an examinee fails to keep an appointment, and are not wholly dependent upon Mobile Medex for their source of clients. Those who testified received half or less than half of their income from Mobile Medex referrals. I therefore FIND that these paramedics are customarily engaged in an independently established business or profession.

CONCLUSION

Consequently, I CONCLUDE that the

paramedics are customarily engaged in an independently established trade, occupation, profession or business within the meaning of N.J.S.A. 43:21-19(i)(6)(C)

SUMMARY

Based upon the above, I CONCLUDE that services performed for Mobile Medex by the paramedics for remuneration should not be deemed to be employment since the paramedics and the services they performed satisfy all of the conditions of N.J.S.A. 43:21-19(i)(6)(A), (B) and (C). Accordingly, I CONCLUDE that the paramedics are not employees of Mobile Medex, Inc. within the meaning of the Unemployment Compensation Law of New Jersey, N.J.S.A 43:21-1 Et seq. and, therefore, Mobile Medex is not subject to liability for contributions under the UCA for remuneration paid to paramedics.

ORDER

It is hereby ORDERED that the claim of the Department of Labor against Mobile Medex, Inc. for contributions under the Unemployment Compensation Law of New Jersey for the years 1981 through 1987 in regard to remuneration paid to paramedics, should be and hereby is DENIED

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF LABOR, CHARLES SERRAINO, who by law is empowered to make a final decision in this matter. However, if Charles Serralno does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A

52:14B-10.

I hereby FILE my initial decision with CHARLES SERRAINO for consideration.

Date	EDITH KLINGER, ALJ
	Receipt Acknowledged:
Date	DEPARTMENT OF LABOR
	Mailed to Parties:
Date	OFFICE OF ADMINISTRATIVE LAW

STATE OF NEW JERSEY
DEPARTMENT OF LABOR

Mobile Medex, Inc.
Petitioner

v. FINAL ADMINISTRATIVE ACTION
OF THE
COMMISSIONER

New Jersey Department of Labor,
Respondent

DOCKET NO.: LID 05056-88
DOL 88-029

ISSUED:April 16,1990

The appeal of Mobile Medex, Inc., concerning an unemployment and disability insurance assessment issued by the New Jersey Department of Labor, was referred to the Office of Administrative Law for a hearing before Administrative Law Judge Edith Klinger. On January 11, 1990, Judge Klinger issued an initial decision dismissing the Department's assessment.

Exceptions were filed by the respondent, and cross exceptions in the form of a letter memorandum were filed by the petitioner.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, I ahve accepted and adopted her findings of fact with the modifications noted below. However, I reject her Order and her conclusion that the petitioner satisfies the standards set forth in N.J.S.A. 43:21-19(i)(6)(A) (B) and (C).

DISCUSSION

The issue in this case is whether the petitioner is liable for contributions pursuant to the New Jersey Unemployment Compensation Act, N.J.S.A. 43:21-1 et seq., for remuneration paid to

paramedics, or whether such paramedics are independent contractors pursuant to N.J.S.A. 43:21-19(i) (6) (A) (B) and (C).

In order to be found independent contractors, petitioner must establish that is paramedics satisfied the three-prong "ABC" test set forth at N.J.S.A. 43:21-19(i)(6)(A)(B) and (C). The "ABC" test provides:

Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (N.J.S.A. 43:21-1 et seq.) unless and until it is shown to the satisfaction of the Division that:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which

such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

All three prongs of the "ABC" test must be met for an individual to be considered an "independent contractor." Otherwise, the relationship is considered to be one of statutorily covered employment. Electrolux Corp. v. Board of Review, 129 N.J.L. 157, 159 (E. & A. 1942), Gilchrist v. DES, 48 N.J. Super. 147, 157 (Apr. Div. 1957). In her initial decision, Judge Klinger found that the paramedics met all three prongs of the "ABC" test, and, therefore, that petitioner was not an "employer" subject to the Unemployment Compensation Act.

With regard to Test A, Judge Klinger determined the facts to show that petitioner did not exercise control or direction over the performance of the paramedicals' services. I disagree. In determining whether the "A" test is met, a case-by-case analysis must be done, and particular attention must be paid to the substance rather than to the form of the relationship. Schomp v. Fuller Brush Co., 124 N.J.L. 487, 490 (Sup. Ct. 1940), aft'd. 126 N.J.L. 368 (E. & A. 1941); Electrolux, Supra. 129 N.J.L. 157 at 159. The Supreme Court in Provident Inst. for Sav. in Jersey City v. Div. of Employment Security, 32 N.J. 585, 590 (1960) stated:

...no matter what the relationship may be called or how careful the parties to it may be in their attempt to create the impression that it is something other than the statutory employment relationship, ... we will look through

the form to the substance... [32 N.J. at 590].

In holding that petitioner has met the requirements of Test "A", the Judge relies on the facts that paramedics can refuse assignments from petitioner, set the time and place for their examinations, are provided no training or instruction, provide their own equipment, have sole control over the contents of their medical reports, and may work for other agencies. All of these factors have existed in numerous administrative and judicial decisions finding that the statutory requirements of Test "A" had not been met. The Judge, however, resolved this issue in a conclusionary fashion without either considering or distinguishing these cases.

In evaluating whether a purported employer is exercising control over an individual who is working in a

professional capacity, a leading case is In the Matter of Russell Cerminara T/A Russell School of Music, A-5888-85-TI, (App. Div. 1987) (unreported). In that case, the school employed music teachers who gave lessons to students. The court in Russell determined that:

> Although to some degree there was minimal control which the School had over the structuring of the individual lessons, this lack of control is inherent in the nature of the services performed by the instructors rather than the nature of the relationship between the instructors and appellant. [Id. at 5]

The Court in Russell further relied on Marcus v. Eastern Agriculture Ass'n Inc., 58 N.J. Super 584, 596 (App. Div. 1959), rev'd on dissent N.J.S.A. 32 N.J. 460 (1960), which concerned the element of control under the workers' compensation statute, N.J.S.A. 34:15-79:

... [W]here the type of work requires little supervision over details for its proper prosecution and the person performing it is so experienced that instructions concerning such details would be superfluous, a degree of supervision no greater than that which is held to be normally consistent with an independent contractor's status might be equally consistent with an employment relationship. In such a situation the factor of control becomes inconclusive. [Id. at 597]

CLD Profiles, Inc. v. New Jersey Department of Labor, LID 05053-88 (Comm. of Labor, November 15, 1989) presents the same factual situation as the present case. In CLD, the Administrative Law Judge found that the paramedics were free from control because CLD merely performed the administrative tasks associated with performing the medical examinations.

The Commissioner reversed the Administrative Law Judge's decision as follows:

I reject this conclusion because the judge failed to apply the broad interpretation of control or direction established in Superior Life v. The Board of Review, 127 N.J.L. 537, 540 (Sup. Ct. 1942) and upheld in scores of judicial and administrative decisions ... In the present case, the fact that petitioner did not control every aspect of the paramedics operation did not render them free from petitioner's direction or control. [Id. at 2].

See also Advanced Health Services, Inc. v. New Jersey Department of Labor, A-6088-88-T3 (App. Div. 1989) (unreported opinion), in which health care professionals placed in private homes by a licensed employment agency which did not supervise the performance of their

duties were held to be employees of the employment agency pursuant to the "ABC" test.

It is clear in the instant case that the paramedics are capable of performing their professional duties without direct guidance or instruction from petitioner. This, however, does not mean that petitioner does not control or direct the paramedics in other aspects of the relationship. For example, petitioner conducts interviews and determines whether to hire the paramedic; requires the paramedics to conduct the examinations within a certain time period; bills the insurance company and performs all of the bookkeeping, photocopying and other associated administrative tasks; and prohibits paramedics from reassigning their examinations.

Additionally, petitioner provides

insurance forms to the paramedics; reviews completed reports and places its stamp on the report; transmits the report to the appropriate insurance company; and pays the paramedics bimonthly, prior to its receiving payment from the insurance company.

Based upon the facts presented regarding petitioner's involvement with the individual paramedics and upon the applicable case law and judicial interpretation of the statute, it is evident that petitioner exerted sufficient control and direction over the paramedics, and that the paramedics do not meet the requirements of Test "A".

The second part of the "ABC" test requires that the service in question is either outside the usual course of business for which such service is performed or is performed outside of all the places of business for which such

service is performed. On the first prong of this issue, Judge Klinger found that "Mobile Medex is not in the business of performing insurance examinations; it is in the business of obtaining paramedical professionals to conduct insurance examinations for the benefit of insurance companies and their insures". [Initial Decision, p. 13]. On the second prong of Test "B", Judge Klinger found that the "sites upon which the paramedics perform their services cannot be considered extensions of the place of business of Mobile Medex". [Initial Decision, p. 14]. On the basis of these findings, Judge Klinger concluded that "the service performed by the paramedics is outside of the usual course of business of Mobile Medex and that service is performed outside of all the places of business of Mobile Medex." [Initial Decision, p. 14].

In evaluating the first prong of test

"B", Judge Klinger incorrectly characterized petitioner's business as obtaining paramedics to conduct insurance examinations for the benefit of insurance companies. Here, the Judge overlooks the obvious fact that petitioner is in the business of supplying paramedical examinations. Insurance companies look to petitioner for examinations, not for paramedics per se. Indeed, if petitioner merely provided a pool of paramedics instead of furnishing medical reports, it is apparent petitioner would not continue in business. In addition to providing paramedics, petitioner exerts continuing control over the process by ensuring that a medical report is completed and mailed to the insurance company. This type of reasoning was rejected by the Commissioner and the Appellate Division in Advanced Health Services, Inc., where

the Administrative Law Judge's holding that the employer performed a matchmaking function was rejected:

... it is impossible to separate the provision of health care from the petitioner's business. Absent the provision of health care, the petitioner's business would not exist. The Judge's finding that petitioner does not provide in-home health care, but provides individuals who perform health care services for clients, is a narrow view not in keeping with the underlying intent of the Unemployment Compensation Act. Advanced Health Services, Inc., Commissioner of Labor Final Order, p.6.

Contrary to Judge Klinger's findings and conclusions on the first prong of Test "B", it is clear from the record that petitioner holds itself out to the public as a provider of "statistical

and/or paramedical evaluation services and the performance of related services for insurance companies and others..." (Exhibit P1). The very essence of petitioner's business is the service performed by the paramedical examiners.

Furthermore, in CLD Profiles, Inc., which involved essentially the same fact pattern, the Administrative Law Judge found that "[i]t is certainly within the usual course of petitioner's business to provide physical examinations for insurance companies." [CLD, Initial Decision, P. 16].

Based on the above, therefore, I dismiss Judge Klinger's finding and conclusion on the first prong of Test "B" and hold that the paramedical services performed by the individuals in question are within the usual course of business for Mobile Medex.

On the second prong of Test "B", the Judge found that the sites at which the examinations were performed cannot be considered extensions of the petitioner's place of business because the paramedics were there on the business of the insurance company rather than of the petitioner. [Initial Decision, p. 14]. Once again, the Judge offers no support for this decision or her failure to consider the Administrative Law Judge's decision in CLD, which tells that "... the service is typically performed at the client's location, which must be considered petitioner's normal place of business". [CLD, Initial Decision, p. 16].

Accordingly, I conclude that petitioner has not satisfied the requirements of Test "B".

The final part of the "ABC" test requires that the individuals in question

must be customarily engaged in an independently established trade, occupation, profession or business. To meet this requirement, individuals must meet the dual test of establishing that the business they purport to be in was established independently of the employment relationship in question and that they were engaged in that independently established activity at the time of rendering the service involved. Gilchrist, at 158.

In making her determination on Test "C", the Judge found that all the paramedics are health care professionals, none received training from petitioner, most paramedics also performed examinations for other entities or had their own independent busiensses,(sic) and all had their own business addresses, telephones and invoice forms. In addition, each

paramedic had his own equipment, provided their own transportation and paid their own expenses.

Several of these findings of fact are not supported by the testimony concerning Test "C". First, Judge Klinger stated that "...most of the paramedics also performed examinations for competitors of petitioner or have their own independent business making direct contact with insurance companies and agents." [Initial Decision at 14]. This statement contradicts the facts in the case, which show that only one paramedical contacted the insurance companies directly.

As previously indicated, Judge Klinger also maintained that all paramedics had their own business addresses, telephones and invoice forms. According to the testimony presented, none of the paramedics stated that they operated out

of business premises per se; rather, they worked out of a room in their house. One paramedic did not even have a separate business telephone line, and none of the paramedics had their own pre-printed invoice forms.

Finally, Judge Klinger stated that the paramedics who testified "... received half or less than half of their income from petitioner." [Initial Decision at p. 16]. There is no indication on the record that any of the individuals received half or less than half of their income from petitioner; indeed, one of the paramedical examiners testified that she received two-thirds of her income from petitioner during the audit period.

The Judge also accorded great weight to the fact that many paramedics worked for other entities. However, the Unemployment Compensation Law, N.J.S.A.

43:21-14.1, acknowledges the possibility of multiple employment. Therefore, the fact that the paramedicals may work for other agencies in addition to Mobile Medex or may solicit business on their own does not mean that the paramedicals could not also be employees of Mobile Medex.

In reaching her conclusion on Test "C", Judge Klinger does not cite any supporting case law. I must reject Judge Klinger's decision because there is ample case law dealing with the same facts as indicated above in which it was determined that Test "C" was not satisfied. Among these are previously cited cases of CLD Profiles and Advanced Health Services.

For the above-stated reasons, I reject the Judge's conclusion that the paramedical engaged by petitioner, Mobile Medex, satisfied N.J.S.A. 43:21-19(i)(6)(A)(B) and (C).

ORDER

The Unemployment and Disability Insurance assessment issued by the New Jersey Department of Labor is hereby affirmed. The Initial Decision of the Administrative Law Judge is rejected.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court.

DECISION RENDERED BY THE

COMMISSIONER OF LABOR

Raymond L. Bramucci
Commissioner
Department of Labor

Correspondence
Alfred B. Vuocolo, Jr., Chief Legal Officer
State of New Jersey
CN 110
Trenton, New Jersey 08625-0110

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4775-89T2

MOBILE MEDEX, INC.,

Petitioner-Appellant,

v.

NEW JERSEY DEPARTMENT OF LABOR,

Respondent-Respondent.

Submitted March 5, 1991
--Decided Mar 27 1991

Before Judges Michels and
D'Annunzio

On appeal from the Commissioner
Department of Labor, State of
New Jersey.

Timothy N. Tuttle, attorney for
appellant Mobile Medex, Inc.

Robert J. Del Tufo, Attorney
General of New Jersey, attorney
for New Jersey Department of
Labor (Michael R. Clancy,
Assistant Attorney General, of
counsel; Alan C. Stephens,
Deputy Attorney General, on the
brief).

PER CURIAM

The final administrative action of the Commissioner of the Department of Labor of the State of New Jersey (Commissioner) declaring petitioner Mobile Medex, Inc. (Mobile Medex) liable for unemployment and temproary disability contributions pursuant to the New Jersey Unemployment Compensation Act for remunerations paid to its paramedics is affirmed substantially for the reasons expressed by Commissioner Bramucci in his written decision of April 16, 1990. We are satisfied from our study of the record and the arguments presented that the Commissioner's decision holding paramedics not to be independent contractors pursuant to N.J.S.A. 43:21-19(i)(6)(A), (B) and (C) is neither arbitrary, capricious nor unreasonable,

BEST AVAILABLE COPY

does not lack full support in the record, and does not violate legislative policies expressed or fairly implied in the statutory scheme administered by the Department of Labor. See Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980); Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963). See also R. 2:11-3(e)(1)(D) and (E).

Affirmed.

I hereby certify that the forgoing is a true copy of the original on file in my office.

Clerk

SUPREME COURT OF NEW JERSEY
C-132 September Term 1991

33,552

MOBILE MEDEX, INC.,
Petitioner-Petitioner,

vs.

ON PETITION FOR CERTIFICATION

NEW JERSEY DEPARTMENT OF LABOR,
Respondent-Respondent.

FILED-
SEP 6 1991

CLERK

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-4775-89T2 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for

certification is denied, with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 4th day of September, 1991.

CLERK OF THE SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE SUPREME COURT OF NEW JERSEY

SUPREME COURT OF NEW JERSFY
M-572/573 September Term 1991

33,552

MOBILE MEDEX,INC.

Plaintiff-Movant,

F I L E D

JAN 16 1992

vs.

CLERK

NEW JERSEY DEPARTMENT OF LABOR,

Defendant-Respondent.

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file motion for reconsideration as within time (M-572) is granted; and it is further

ORDERED that the motion for reconsideration (M-573) is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 14th day of January, 1992.

CLERK OF THE SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE SUPREME COURT OF NEW JERSEY